In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 916

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of New York of theft of jewelry from an interstate shipment in violation of 18 U.S.C. 659. On October 28, 1966, he was sentenced to imprisonment for seven years. The court of appeals affirmed the conviction without opinion on March 15, 1967 and a petition for a writ of certiorari was denied by this Court, 389 U.S. 836. As appears from the government's earlier brief in opposition (No. 166, O.T. 1967) a major issue raised

on direct appeal and in this Court was the fairness of the procedures by which petitioner was identified.

In his present motion to vacate sentence petitioner again attacked the fairness of the identification. The district court denied the motion without a hearing (Pet. App. 1a). The court of appeals affirmed with an opinion which sets forth in detail the evidence at the trial (Pet. App. 3a-7a) and the nature of the new evidence alleged (Pet. App. 7a-8a). The court stated that if "the petition had alleged any new evidence that would have significantly buttressed the claim of impermissibly suggestive identification and if this was not discoverable before the trial in the exercise of reasonable diligence, we would indeed direct a hearing." (Pet. App. 10a-11a). It deemed "a conviction resting solely on identifications alleged to have been impermissibly suggestive" to rank "high on the list where re-examination on collateral attack is warranted if a sufficient basis is shown." (Pet. App. 11a). Upon a thorough examination, however, it found that the application here "did not measure up to that standard" (Pet. App. 11a). This factual conclusion resting upon the due process standards reaffirmed in *Stovall* v. *Denno*, 388 U.S. 293, does not merit plenary review by this Court.[1]

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[1] Petitioner recognizes (Pet. 20) that the principles of *United States* v. *Wade*, 388 U.S. 218, do not apply since the identifications occurred prior to the decision in *Wade*. See *Stovall* v. *Denno*, 388 U.S. 293, 296.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970 410068 840